In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-663

LOUIS SAGER HUNSUCKER, PETITIONER

v.

ROBERT L. PHINNEY, DISTRICT DIRECTOR OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

The sole question presented is whether the district court had jurisdiction under 28 U.S.C. 1356 to enjoin the District Director of Internal Revenue from using certain documents as evidence.

Petitioner brought this action in the United States District Court for the Western District of Texas, seeking to have certain documents, which were allegedly illegally seized, returned to him and to enjoin the District Director of Internal Revenue from using the documents as evidence in civil or criminal proceedings. Prior to trial, the Internal Revenue Service returned the original documents to petitioner. However, the Service retained copies of some of the documents for use in considering possible wagering tax assessments against petitioner (Pet. App. 4a, 11a). The evidence upon which the assessments were

to be based was seized pursuant to a search warrant. The district court dismissed the suit, holding that the action was premature, and alternatively, that the evidence was lawfully seized (Pet. App. 5a-6a). The court of appeals affirmed on the ground that petitioner had an adequate remedy at law so that the district court was without jurisdiction to grant the equitable relief requested (Pet. App. 19a).

1. Pursuant to 28 U.S.C. 1356, the district courts have original jurisdiction of any seizure under any federal law not within admiralty or maritime jurisdiction. As the court of appeals observed (Pet. App. 17a), this Court in *Slocum* v. *Mayberry*, 2 Wheat. 1, held that the federal courts had no jurisdiction to entertain suits for recovery of property taken by federal officers without authority. Accord: *Johnston* v. *Earle*, 245 F.2d 793, 794-795 (C.A. 9). In any event, the specific relief sought by petitioner is not the return of the documents, which have in fact been restored to his possession (Pet. App. 3a-4a, 11a), but to enjoin the District Director from using copies of the documents.

Such relief, as court of appeals noted (Pet. App. 16a-17a), is equitable in nature and petitioner has made no showing of irreparable injury to invoke the court's equity jurisdiction.[1] Indeed, petitioner has not been subjected to any criminal or civil tax proceeding on the basis of the documents seized. Petitioner's attempt to enjoin the Service's use of the copies of the documents could be reviewed at such time when the government commences such proceedings. Accordingly, the court of appeals concluded (Pet. App. 17a) that the district court properly refused to entertain petitioner's suit to enjoin the District Director's use of the documents at this time (see Pet. App. 25a-26a, n. 9).

2. Furthermore, as the court of appeals noted (Pet. App. 19a), petitioner's suit is prohibited by the Anti-Injunction Act, 26 U.S.C. 7421(a). That statute provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person * * *." Thus, while petitioner may disclaim that this suit is intended to restrain the assessment and collection of revenues (see Pet. App. 11a-12a), the principal effect of enjoining the Service's use of the copies of the documents would be to restrain the assessment of taxes. See *Strother* v. *Bickerstaff*, C.A. 10, No. 74-1131, decided December 18, 1974. This action is therefore barred by the Anti-Injunction Act. *Bob Jones University* v. *Simon*, 416 U.S. 725, 738-742.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JANUARY 1975.

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[1]Petitioner's reliance (Pet. 5-6) on *Bell* v. *Hood*, 327 U.S. 678, and *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, is misplaced. Those cases involve the question whether the court had jurisdiction to award damages against federal officers for violations of constitutional rights. Neither case involves 28 U.S.C. 1356 or the equity jurisdiction of the federal courts.